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No. 83-436

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

Donald Regan, Secretary of the Treasury,
Et Al., Petitioners

v.

Ruth Wald, Et. Al.,
Respondents

BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

The Chicago Council of Lawyers

Interest of the Amicus[1]

The Chicago Council of Lawyers, a member bar association of the American Bar Association, submits this brief amicus curiae in support of Respondents. The Council, through the filing of amicus briefs and otherwise, has actively supported the exercise of constitu-

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[1]Letters of the petitioners and respondents giving their consent to file this brief have been filed with the Clerk of this Court.

tional rights to individual liberty and the observance of constitutional separation of powers. The Council views this case as implicating both constitutional liberty interests and questions of separation of powers, albeit in the context of a question of statutory construction. The Council also views the case as affecting the rights of its members to travel across international boundaries.

SUMMARY OF ARGUMENT

1. The right to travel abroad is a constitutional right protected by the Fifth Amendment which cannot be restricted without the express or implied approval of Congress. Treasury Department regulations prohibiting expenditures necessary to travel to Cuba effectively prohibit travel to Cuba by the vast majority of American citizens. Yet, Congress never granted the Executive branch

the sweeping authority to restrict travel abroad which Petitioners claim here.

The legislative history of the Trading With the Enemy Act and its subsequent amendments demonstrate that Congress has not expressly nor impliedly given the Treasury Department authority to restrict travel. Rather, the actions of Congress indicate that it believes that the TWEA cannot be used to restrict travel. In addition, Congress has clearly narrowed Executive authority to create and enforce area restrictions on foreign travel. Nor has the Treasury Department itself actively asserted the power it claims through its amendment of 31 C.F.R. 515.560--to restrict travel to a particular country.

Thus, since Congress has neither expressly approved nor acquiesced to a Treasury Department policy of restricting travel, the Treasury Department regulations are not statutorily authorized and therefore unconstitutional.

2. Travel abroad is a fundamental right which is closely related to rights protected by the First Amendment. This Court has consistently found that the Constitution protects the right to receive information and ideas. The importance of this right is not diminished simply because the Government's regulations prohibit travel through which citizens can obtain information, rather than regulate the information itself. The unique access to information that travel provides has been underscored in the decisions of this Court. It is especially important with respect to questions of foreign policy, since an informed citizenry may be the only effective restraint upon the Executive's to conduct foreign affairs. The regulation at issue effectively prevents United States citizens from making informed judgments regarding fundamental questions of their government's foreign policy towards Cuba.

Petitioners do not avoid the mandate of the Constitution by claiming that the regulations have only an incidental effect on travel. The immediate and direct effect of the regulations is to prevent travel to Cuba. As the Government itself has admitted, the regulations are a "ban on travel".

Finally, limitations on the right to travel are permissible only in situations which impose an imminent danger to national security or to the lives of American citizens. Since the travel at issue here involves neither consideration, the regulations are an unconstitutional limitation of the freedom of Americans to travel abroad.

I.

CONGRESS NEVER AUTHORIZED THE PRESIDENT TO RESTRICT TRAVEL UNDER THE TRADING WITH THE ENEMY ACT OF 1917.

The right to travel abroad is a "personal liberty protected by the Bill of Rights...." Aptheker v. Secretary of State, 378 U.S. 500, 516 (1964). Even when regulation of foreign travel is otherwise constitutional, decisions of this Court establish that the right to travel cannot be regulated without Congress' express authorization or implied approval where Congress has granted broad rule making authority specifically related to foreign travel. Haig v. Agee, 453 U.S. 280 (1981); Zemel v. Rusk, 381 U.S. 1 (1965). Because travel is a right protected by the Constitution, any grant of authority to the Executive branch must be narrowly construed. Kent v. Dulles, 357 U.S. 116, 129 (1958).

Petitioners argue that the authority delegated to the Executive to regulate trade

under Section 5(b) of the Trading With the Enemy Act of 1917 (TWEA), 50 U.S.C. App. Section 5(b), emcompasses regulation of travel related currency transactions which effectively prohibit travel to Cuba. To support this contention, Petitioners make note that such regulations had been published by the Treasury Department in 1963 and were not removed until 1977. But clearly, publication, standing alone, cannot create authoriztion where none exists. Moreover, the history of the TWEA as well as congressional action and intent with regard to travel restrictions, contradict Petitioners' claim.

Section 5(b), from which the Executive claims its authority to impose the restrictions at issue here, was intended to apply only to commercial and mercantile transactions, not to personal travel by American citizens. From the time of its passage, Section 5(b) was directed only at trade. While the statute

contains a comprehensive list of commercial transactions subject to regulation, and has been amended several times, it has never made mention of the regulation of transactions related to travel.[2] Moreover, in a report on the freedom to travel, a distinguished committee which included members of Congress and high level Executive department personnel concluded that the Trading With the Enemy Act (TWEA) "was never intended to be used

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[2]The debate and hearings prior to the passage of TWEA in 1917 focused on commercial and administrative issues such as patents, disposition of foreign shareholders' dividends, and questions involving international exchange and gold transactions. See e.g., Trading With the Enemy, Subcomm. on International Trade and Commerce, 94th Cong., 1st Sess. 52-58, 77-78, 185 (1976). Later amendments involved: adding the "hoarding" of gold to the list of regulated transactions, Second Liberty Bond Act of 1918, ch. 176 Section 5, 40 Stat. 966 (1918); broadening the TWEA to cover national emergencies so that the 1933 banking "emergency" came within its ambit, Emergency Banking Relief Act of 1933, ch. 1, Section 52, 48 Stat. 1 (1933); and adding regulation of transactions in stocks and bonds. Joint Resolution of May 7, 1940, ch. 185, 54 Stat. 179 (1940).

as a device for the regulation of travel or passports." Association of the Bar of New York, Freedom to Travel 72 (1958).[3]

Nor has Section 5(b) ever been enforced against persons who have openly travelled to countries which have been subject to TWEA embargoes. Department of Treasury officials, themselves, declined opportunities to prosecute such alleged violations of the Act. Id. When the Government did attempt to prosecute persons for traveling to restricted or embargoed countries, such as Cuba, it looked only to the provisions of the Passport Act. See, United States v. Laub, 385 U.S. 475 (1967). Moreover, the Justice Department

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[3]The committee which drafted the report included John Foster Dulles, the then Secretary of State, Senator Theodore Green, Representative William M. McCulloch, George C. Doub, Assistant Attorney General, Civil Division, Department of Justice, as well as legal staff from the State Department, Justice Department and Senate Judiciary and Foreign Relations Committees. Freedom To Travel, supra at xvii-xx.

acknowledged on several occasions after Laub that the Government lacked any authority to enforce restrictions on travel to Cuba.[4] Since neither the Treasury not Justice Departments attempted "actual enforcement" or actively asserted power to restrict travel under TWEA, there is no indication that such an Executive policy existed. See, Agee, 453 U.S. at 303. Consequently, any claim that Congress has authorized the regulation sub silentio is patently untennable.

Indeed, in stark contrast to the congressional acquiescence to the Executive's exercise of authority in Agee, Congress has been neither silent about, nor approving of, any prior exercise of travel restrictions

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[4]See Statement of A. William Olson, Asst. Atty. Gen., in Hearings on Restraints on Travel to Hostile Areas H.R. 1594 (Clean Bill H.R. 8023), H.R. 278, H.R. 297, H.R. 2691, H.R. 3999, H.R. 6047 before the Committee on Internal Security, House of Representatives, 93d Cong., 1st Sess. 58 (1973). See also, H.R. Rep. No. 92-1461, 92d Cong., 2d Sess. 7 (1972).

now claimed to be granted in TWEA. In fact, after the 1967 decision in Laub, members of Congress reacted to reports that hundreds of young Americans were traveling to Cuba and expressed frustration at the Government's inability, under then existing authority, to stop the continuing travel. For example, Representative Ichord complained that the Secretary of State was "powerless" to prevent travel to Cuba. 115 Cong. Rec. 34332 (1969). Faced with the absence of criminal sanctions to punish 213 United States citizens who travelled to Cuba to cut sugar cane, Senator Eastland published each of their names in order to identify them to "our citizenry". 116 Cong. Rec. 7465 (1970).

Moreover, Congress was not unmindful of the fact that the effect of the vast numbers of Americans who were traveling to Cuba to cut sugar cane was to undermine United States economic sanctions against

Cuba. Representative Adair remarked in the House of Representatives:

> "[I]t seems most self- defeating to permit Americans to lend assistance in the harvesting of the 1970 sugar crop...This, in my opinion, is sufficient justification for the introduction and passage of legislation which for the first time gives the Secretary of State authority to impose and enforce area travel restrictions."

115 Cong. Rec. 31622 (1969)(emphasis added).

Yet, despite the persistent congressional perception that the State Department had no authority to punish the travelers to Cuba, not one member of Congress ever called upon the Executive branch to prevent or sanction travel to embargoed countries under any purported TWEA authority.

The reason for this is simple. Congress assumed that no such authority existed. As the House Committee on Internal Security stated in its report on H.R. 8023, "[t]he Executive's existing authority to impose area travel restrictions in conducting the

Nation's foreign affairs is not enforceable because of the absence of penal sanctions." H.R. Rep. No. 93-248, 93d Cong., 1st Sess. 1 (1973). House Bill 8023 was only one of a number of unsuccessful bills introduced in Congress to give the Executive, for the first time, the very authority claimed here--the authority to impose criminal penalties for travel to restricted areas, specifically Cuba.[5] These bills would have been superfluous if the sanctions already existed under TWEA. Moreover, Congress rejected efforts to expand the Government's authority to restrict travel soley on the basis that "such travel would seriously impair the conduct of United States

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[5]Legislative measures were introduced in every Congress from 1958 to 1976 to provide for ciminal sanctions for violations of area restrictions. Note, Area Restrictions and the Right to Travel Abroad, 8 U. Calif. at Davis L.R. 401, 426-27 (1975). See e.g., S.806, S.1973, S.2287 and S.2315, 86th Cong., 1st Sess. (1959); S.3243, 89th Cong., 2d Sess. (1966); H.R. 8023, H.R. 16742, 93d Cong. 1st Sess. (1973).

foreign policy." H.R. 383 and H.R. 14893, 92d Cong. 2d Sess. (1972).

When Congress finally acted in 1978 to redefine the Executive's authority to impose area restrictions, it expressly and purposely narrowed that authority. Pursuant to the 1978 amendment to the Passport Act, area restrictions may only be imposed on passports for travel to "a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers." Foreign Relations Authorization Act of 1978, Pub.L. No. 95-426, Section 124, 92 Stat. 971 (codified as amended at 22 U.S.C. Section 211a).

Thus, not only is there simply no basis for a claim that "there was in reality any definite policy in which Congress could have acquiesced," Agee, 453 U.S. at 303,

but Congress has both affirmatively and impliedly indicated its view that the Executive has no authority to adopt any such policy. In fact, Congress has repeatedly rejected proposals to grant the Executive the kind of authority the Government now claims it had all along. In sum, the Tresury Department regulations prohibiting travel to Cuba are unauthorized and, thus, unconstitutional.[6]

II.

THE TREASURY DEPARTMENT REGULATIONS PROHIBITING EXPENDITURES NECESSARY TO TRAVEL TO CUBA VIOLATE THE CONSTITUTIONAL RIGHT TO TRAVEL ABROAD

Freedom to travel abroad "is a constitutional liberty closely related to the rights of free speech and association" embodied

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[6]Assuming arguendo, contrary to amicus' position, that such authority did exist under TWEA, amicus concurs with the court below that no such power was being exercised as of July 1977. Therefore, the authority to restrict travel through asset controls was not included in those authorities continued under the Grandfather Clause.

in the First Amendment. Aptheker, 378 U.S. at 517. The right to travel is a fundamental aspect of a citizen's liberty which is deeply engrained in our national heritage. It is also recognized as a basic human right by international accords.[7]

Because it is so vital to the exercise of political rights, the right to international

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[7]The Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations in 1948, provides in Article 12 of the International Covenant on Civil and Political Rights that the right to travel abroad "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others." G.A. Res. 2200(XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966). Virtually identical provisions were incorporated into Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, 213 U.N.T.S. 222, and Article 22 of the American Convention on Human Rights adopted by the Organization of American States, signed Nov. 22, 1969. O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23, doc. 21, rev.2. No such necessity, justifying restricting the right to travel, exists here. See pp. 28-35, infra.

travel can only be restricted where Congress has clearly authorized the limitation to preserve the national security or to protect the health and safety of American citizens. See e.g., Zemel, 381 U.S. 1 (1965); Agee, 453 U.S. 280 (1981). Such authorization and justification for infringing the constitutional right to travel abroad are not present here.

A. The Right To Travel Abroad Has Substantial First Amendment Implications and Is Fundamental To A Free Society

It is unarguable that "the Constitution protects the right to receive information and ideas." Stanley v. Georgia, 394 U.S. 557, 564 (1969). The significance of this protection was expressed by Mr. Justice White in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969):

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail....It is the right of the public to receive suitable access to social, political, esthetic, moral, and other

ideas and experiences which is crucial here.

The importance of this right is not diminished simply because the method of regulation prevents travel to obtain the information rather than regulating the information itself.[8]

The enormous powers of the Executive in the area of foreign policy are counterbalanced only by accountability to the citizens of the United States who are the ultimate judges of the wisdom of the policies adopted. As Mr. Justice Stewart concurring in New

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[8] In Zemel, this Court upheld a limitation on the right to travel even when the right asserted was linked to the right to access to information. The limitation was valid because it rested on the "weightiest considerations of national security." 381 U.S. at 16 (1965). Moreover, in Kleindienst v. Mandel, this Court specifically acknowledged the substantial First Amendment considerations of access to information present in the context of denials of visas to foreign visitors, but it found such considerations irrelevant to its inquiry since it was compelled to sustain Congress' plenary power to exclude aliens. 408 U.S. 753, 765 (1972). No such plenary power exists with respect to foreign travel by American citizens.

York Times Co. v. United States, 403 U.S. 713, 728 (1971) observed:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry--in an informed and critical public opinion which alone can here protect the values of democratic government.

Public access to information is thus especially important with respect to foreign policy issues.

The unique access to information that foreign travel provides enables citizens to evaluate their government's policies first-hand. This Court acknowledged this important interest in Kent, 357 U.S. at 127:

> An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Quoting Z. Chafee, Three Human Rights in the Constitution of 1787 197 (1956).

The ability of citizens to make informed

judgments about foreign policy issues is essential in the modern era when foreign policy decisions impact profoundly on the economic and social well being of all American citizens.[9]

Moreover, restrictions on travel to specific areas have particular implications for First Amendment Freedoms, since they effectively cut off an entire nation or region from view. In this respect, the right to travel to Cuba takes on even greater importance when one considers that the ability of Americans to engage in face to face dialogue with Cuban officials, scholars, and social leaders has been severely limited since 1981 by the State Department's policy of

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[9]American citizens must support foreign aid with their tax dollars. In addition, regulation of foreign trade substantially affects both industry and labor. Increasingly, foreign policy decisions pose serious moral questions to the American public as is evident in the agonizing debate over American aid given to governments which flaunt basic human rights.

denying visas to Cubans invited to speak in the United States.[10] Imposition of the travel restrictions challenged here thus closes the circle of isolation, foreclosing almost all contact between Americans and Cubans.

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[10] In September of 1981, the Government prevented four Cuban officials from attending a seminar organized, in part, by members of the United States Senate and House, which was to focus on United States/Cuban relations. N.Y. Times, Sept. 17, 1981, at A5, col. 2. The Government later refused to grant a visa to the Cuban Deputy Minister of Culture who was invited to attend an international film festival in Los Angeles. In announcing the denial, a spokesman for the Department of State indicated that "Cuban officials were normally banned [from the United States] unless they were involved in diplomatic discussions or attending international meetings such as the United Nations." N.Y. Times, Apr. 19, 1982, at A3, col. 3. Not only officials, but scholars also are barred entry. Visas were denied to two Cuban philosophers, invited to attend the American Philosophical Association's Eastern Meetings in December, 1982. N.Y. Times, Dec. 30, 1982, at. A5, Col. 5. Such visa denials are specifically authorized by the Immigration and Nationality Act of 1952, 8 U.S.C. 1182. In contrast, Congress granted no such authority to prohibit expenditures necessary for international travel at issue here. See supra at pp. 6-15.

United States relations with Cuba have been the subject of considerable controversy for the past two decades. Administrations have pursued differing policies. Under President Carter, the United States moved closer to normalized relations with Cuba;[11] President Reagan has moved the United States away from pursuing such negotiations.[12] It is precisely because the issue of United States-Cuban relations is so debatable that

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[11]In his statement before the House Subcommittee on Inter-American Affairs, Myles Frechette, Country Director for Cuban Affairs, Department of State, reported that between 1977 and 1980 the United States had opened "constructive lines of communication between Cuba and the United States" and that "[o]ur dialogue with Cuba has cost us little and has yielded some significant benefits." Impact of Cuban Soviet Ties in the Western Hemisphere, Spring 1980, Before the Subcomm. on Inter-American Affairs of the Comm. on Foreign Affairs, H.R. 86th Cong., 2d Sess. 70 (1980).

[12]Wayne Smith, chief of the United States diplomatic mission in Havana from 1979 until summer of 1982, described the policy of the Reagan administration toward Cuba as one which is "going in the opposite direction" from improved relations. N.Y. Times, Sept. 5, 1982, at A3, Col. 1.

it is all the more important that American citizens not be denied the right to visit Cuba, speak to the Cuban people, and inform themselves concerning what policy they believe is in the best interests of the United States to pursue.

B. The Government's Regulations Prohibiting Expenditures Necessary For Travel To Cuba Do Not Have Merely An "Incidental" Impact: They Effectively Bar Travel By the Vast Majority of Americans.

In its brief, the Government contends that the challenged regulations do not "regulate travel as such" but merely have "the incidental effect of making it harder for a person to go to a particular country." Brief of Petitioner at 53. Such an argument defies reason and denigrates the substantial liberty interest at stake. Prohibition of expenditures

necessary for travel prevents travel.[13]

Petitioner's reliance on Califano v. Aznavorian, 439 U.S. 170 (1978) for the proposition that regulations which "incidentally" effect travel are permissible is misplaced. In Aznavorian, the Court was faced with determining the constitutionality of a provision of the Social Security Act which provided that no person could receive Supplemental Security Income Benefits for a thirty day period, if the individual had been out of the United States for more than thirty consecutive days. Id. at 171. In upholding the regulation's constitutionality, this Court reasoned that the regulation did not prevent travel, it merely limited eligibility to a statutory benefit for a brief period after an extended

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[13]With the exception of the unusual circumstance that American visitors are invited guests for whom all travel, lodging and meals are paid by the Cuban government, all other travel not covered by one of the narrow exemptions is effectively prohibited.

absence from the United States. Id.

In contrast, the effect on travel of the Treasury Department's regulations at issue here could not be more direct. The regulations do not merely make it more difficult to travel to Cuba, they impose harsh criminal penalties for the expenditure of so much as a single dime in connection with such travel.[14] Not only is the substantial impact on travel self-evident, but Treasury Department spokesmen themselves have candidly characterized the regulations as a ban on travel.[15]

Moreover, contrary to the Government's

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[14]Violation of the Treasury Department regulations promulgated under the Trading With the Enemy Act is a felony punishable by imprisonment for not more than ten years and/or a fine of not more than $50,000. 50 U.S.C. App. Section 16.

[15]Announcing the new regulations in April, 1982, assistant Treasury secretary John Walker stated "We can ban the travel and we are banning it." Chi. Sun Times, Apr. 20, 1982, at 15, col. 2.

contentions, the regulations are not tailored to prevent only business and tourist travel. Excluded from the categories for which licenses are granted are tens of thousands of Americans who have an interest in traveling to Cuba, not to enjoy its beaches, but to learn about Cuban society and culture. For example, the regulations specifically prohibit "study visits..in connection with pre-college or undergraduate college course work." 31 C.F.R. 515.560(h)(2). Indeed, the record in this case shows that the Treasury Department denied licenses when sought by persons for such educational purposes in 1982.[16] Also specifically excluded is travel for the purpose of "research for personal satisfaction only." Id.

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[16]A blanket license was denied to the Center for Cuban Studies to permit 98 individuals to attend an interdisciplinary study tour. See J.A. 69-70. And a license was denied for a study tour for a group of high school students. See J.A. 82-83.

The regulations also arbitrarily limit travel which is permitted for "professional research". Under the regulations a professor of history could travel to Cuba to engage in full-time research which is specifically related to Cuba in the area of his or her specialty, but the same professor could not travel to Cuba for the purpose of "attending general lectures devoted to Cuban culture and contemporary life." 31 C.F.R. 515.560(h)(5). Nor could the professor, after completing the permitted research, remain in Cuba to attend more general lectures which might enrich his or her understanding of Cuban society. Id.

Similarly, attorney members of the Chicago Council of Lawyers, if invited to attend an international seminar on maritime law to be held in Havana would be barred from attending. Permission might be granted, however, if the seminar were exclusively

pertaining to "The Maritime Law of Cuba". Id. On their face, such regulations suppress knowledge not tourism.

The Government further attempts to trivialize the substantial interests at stake here by equating expenditures necessary for travel with the purchase of Cuban cigars. Brief for Petitioners at 14. The equation is spurious. At issue here is the ability of the Executive to curtail a freedom basic to the values of our society in the absence of any compelling emergency and without the express or implied authorization of Congress.

C. Only the Weightiest Considerations of National Security, Not Present Here, Justify Limiting the Right To International Travel.

The Government contends that it may regulate travel simply as a tool to shape foreign policy. Brief of Petitioners at 35. The Government's contention not only

goes well beyond the prior rulings of this Court but would serve to undermine the fundamental liberties our foreign policy is presumably designed to protect.

Only circumstances posing an imminent threat to national security or to the lives of American citizens justify governmental limitations on the right to international travel. Zemel, 381 U.S. at 16; See also, Agee, 453 U.S. at 307. In Zemel, exigent circumstances surrounding the Cuban missile crisis were characterized by this Court as involving the "weightiest considerations of national security" and were, therefore, sufficient to justify restrictions on travel to Cuba in late 1962. 381 U.S. at 16; see also, Mandel, 408 U.S. at 764. Moreover, in 1978, when Congress amended the Passport Act, it specifically defined these "weighty considerations" by limiting passport area restrictions to the emergencies of "war",

"armed hostilities" or "imminent danger to the public health or the physicial safety of United States travellers." Foreign Relations Authorization Act of 1978: Pub.L. No. 95-426, Section 124, 92 Stat. 971 (codified as amended at 22 U.S.C. Section 211a).

Noting the 1978 amendment to the Passport Act, this Court upheld revocation of a passport in extraordinary circumstances where the person travelling posed a serious threat to national security. Agee, 453 U.S. at 285. In Agee, the passport holder's intentional identification of United States intelligence agents abroad resulted in episodes of violence against the persons identified and also "jeopardized the security of the United States". Id. at 308.

The Government does not argue, nor could it, that travel to Cuba poses a substantial threat to the national security or endangers the lives of American citizens. The justifi-

cation given for imposing restrictions on travel to Cuba in 1982 is simply that they serve foreign policy objectives of this administration relative to Cuba.[17] Petitioner's Brief at 34-35. But "foreign policy", like "war power", "cannot be invoked as a talismanic incantation to support any exercise of...power which can be brought within its ambit."

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[17]Although the government attempts to use the phrases "national security" and "foreign policy" interchangeably, no direct effect on national security resulting from travel to Cuba is demonstrated. At best, prohibition of travel may have an indirect and minimal effect on the administration's foreign policy objectives. Moreover, officials within the present administration have questioned factual assumptions underlying these objectives. For example, the principle rationale given for curtailing travel in 1982 was that Cuba was "increasing its support for armed violence in this hemisphere," and prohibitions on expenditures necessary for travel would reduce Cuba's ability to provide such alleged support. New York Times, April 20, 1982, at A1, col. 4. Wayne Smith, the chief of the United States' diplomatic mission in Havana at the time, has stated, however, that "U.S. evidence of (Cuban) arms shipments has never been solid" and that "this factor in the equation has been greatly exaggerated." New York Times, September 5, 1982, at 3, col. 1.

United States v. Robel, 389 U.S. 258, 263-64 (1967). To the contrary, this Court has refused to grant virtually unlimited discretion to the Executive, when that claim is based solely on foreign policy considerations. Id., see also, Youngstown Sheet and Tube Co.v. Sawyer, 343 U.S. 579 (1952).

Moreover, Congress has specifically asserted that the right to travel is to be insulated from the vacillations of foreign policy. The Senate Foreign Relations Committee Report accompanying the 1978 Amendment to the Passport Act, which limited the President's authority to impose area restrictions on travel states:

> [T]he committee believes that the freedom-of-travel principle is sufficiently important that it should be a matter of law not dependent upon a particular Administration's policy.

S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978). By imposing restrictions on travel to Cuba as an "instrument" of foreign

policy, the Executive branch has contradicted the express will of Congress.

While it is not the role of this Court to judge the wisdom of a particular policy, it must not let foreign policy considerations routinely sweep aside constitutional freedoms. Liberty interests must be protected even in difficult times. As this Court has observed:

> It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties...which makes the defense of the nation worthwhile.

United States v. Robel, 389 U.S. at 264 (1967).

Congress' concern that freedom to travel should not be vulnerable to changes in administration policies is particularly pertinent to the circumstances in this case. President Carter removed all restrictions in recognition of the freedom to travel principle. The Presidential News Conference of March 9, 1977, 13 Weekly Comp. of Pres. Doc. 328-29

(1977). The principle endures. It should not be abandoned merely to accommodate shifts in perspectives.

To the extent that prohibiting expenditures necessary for travel to Cuba serves any legitimate foreign policy objectives, the impact is at best speculative and minimal. There is no evidence that regulations will have more than a minimal effect on the Cuban economy. By the Government's own calculations, the regulations would affect less than 40% of travel from the United States to Cuba. N.Y. Times, Apr. 20, 1982, at A9, col. 4. Indeed, at the time the Government acted to restrict the right of Americans to travel to Cuba it had not even made an estimate of the regulation's impact on Cuba's earnings. Chi. Sun-Times, Apr. 20, 1984, at 15, col. 2. The cost in constitutional liberty, however,

is calculable and substantial. When such regulation is not authorized by Congress, nor justified by national emergency, it comes at a price democracy cannot afford.

CONCLUSION

The judgment of the First Circuit Court of Appeals should be affirmed.

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